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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

MICHAEL JOHN WRIGHT et al.,
Plaintiffs and Appellants,
v.
STEPHEN V. WICKERSHAM,
Defendant and Respondent.

A132596

(Alameda County
Super. Ct. No. AG10544786)

Appellants Michael John Wright, individually and as Trustee of the Carlton Merrit Trust, and Linda Wright seek review of a judgment entered upon a demurrer. Because the judgment was issued while appellants' leave to file an amended complaint had not expired, we reverse. Respondent agrees that appellants should be afforded the opportunity to file an amended complaint.

BACKGROUND

Appellants sued respondent Stephen Wickersham, an attorney, for alleged deficiencies in his representation of them in a lawsuit concerning a real estate transaction. The complaint alleged claims labeled fraudulent concealment, unjust enrichment, legal malpractice, negligence, breach of fiduciary duty, and sought damages for fraud and deceit. Respondent demurred.

In its tentative ruling on the demurrer, the superior court concluded that each of appellants' causes of action appeared to be rooted in a claim of legal malpractice. Accordingly, the court determined the legal malpractice claims were barred by the statute

of limitations stated in Code of Civil Procedure, section 340.6.¹ The tentative ruling provided appellants until June 7, 2011 to file an amended complaint.

Appellants contested the tentative ruling at the hearing on the demurrer. Counsel for respondent did not appear. The court modified its tentative ruling to allow appellants until June 24, rather than June 7, to file their amended complaint.

Counsel for respondent was unaware that appellants contested the tentative ruling and that the court enlarged the time for them to file an amended complaint. Thus, even though they had until June 24 to amend, respondent filed an ex parte application on June 14 seeking to dismiss the complaint for appellants' failure to amend by June 7. The court granted the application and dismissed appellants' complaint with prejudice. This appeal is timely.

DISCUSSION

California Rules of Court, rule 3.1320(h) provides that a party may apply ex parte for an order dismissing an action and for entry of judgment "after expiration of the time to amend following the sustaining of a demurrer." Here, respondent applied for just such an order on June 14, 2011 in the mistaken belief that appellants' time to amend had expired. The court dismissed the action and entered judgment on June 16. The dismissal and judgment were premature because the court's ruling on the demurrer allowed appellants until June 24 to file their amended complaint.

The ex parte entry of judgment before the time expired for appellants' leave to amend wrongfully deprived them of the opportunity to state a cause of action, and was an act in excess of the court's jurisdiction. (See, e.g., *Deeter v. Angus* (1986) 179 Cal.App.3d 241, 251.) It was reversible judicial error (*People v. Davidson* (2008) 159 Cal.App.4th 205, 210), that is correctable on appeal. (See 2 Witkin, California Procedure (5th ed. 2008) Jurisdiction, § 302, p. 915.)

¹ In their Opening Brief, appellants do not challenge the ruling on demurrer insofar as it concluded their claim for legal malpractice was time barred. Instead they argue that they should be afforded an opportunity to plead fraud-based causes of action that would remove their claims from the operative effect of Code of Civil Procedure, section 340.6.

DISPOSITION

The judgment is reversed, and this case is remanded to afford appellants an opportunity to file an amended complaint.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.